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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

ANTONIO A.F. DE SALLES,
et al.,

Plaintiffs and
Respondents,

v.

NEUROSIGMA, INC.,

Defendant and
Appellant.

B287127

(Los Angeles County
Super. Ct. No. LC105572)

APPEAL from order of the Superior Court of Los Angeles County, John J. Kralik, Judge. Affirmed.

Baker & Hostler, Michael D. Mortenson, Andrew A. Wood, F. Lucas Paule, for Defendant and Appellant.

Gibbs Giden Locher Turner Senet & Wittbrodt, Glen E. Turner III, for Plaintiffs and Respondents.

Defendant and appellant NeuroSigma, Inc., appeals from a judgment in favor of plaintiffs and respondents Antonio A.F. De Salles and Alessandra Gorgulho in this action to confirm an arbitration award. On appeal, NeuroSigma contends: (1) the state court did not have jurisdiction to confirm the arbitration award, because the federal court had jurisdiction over the arbitration proceedings until the federal case was voluntarily dismissed with prejudice by stipulation of the parties, barring relitigation of the issues; and (2) even if the state court had jurisdiction to confirm the arbitration award, the award should have been modified to delete sanctions and interest imposed in the final award in excess of the arbitration panel's authority. Specifically, NeuroSigma contends the final award improperly modified a prior award, was issued more than 30 days after the close of the hearing, and provided unauthorized enforcement of the prior award.

We conclude that the trial court had jurisdiction to confirm the arbitration award. The parties' stipulation to voluntarily dismiss the federal matter required the federal court to retain jurisdiction over enforcement of a settlement agreement. The federal court entered an order of dismissal on the stipulated terms. Subsequently, however, the federal court vacated all orders in the case, including the dismissal order pursuant to the stipulation. The federal court entered a new and different order dismissing the case for lack of

diversity jurisdiction, which did not bar an action to confirm the arbitration award in state court.

NeuroSigma did not oppose confirmation of the arbitration award on the ground that a valid settlement agreement existed, nor did NeuroSigma raise the enforceability of the settlement agreement as a disputed issue for the trial court to adjudicate. In fact, NeuroSigma represented that the settlement agreement was invalid and ineffective. NeuroSigma had the opportunity to raise issues related to the settlement agreement in opposition to the petition to confirm the arbitration award and failed to challenge the award on those grounds, waiving the issues.

The arbitrators had authority to issue the final award, which added remedies to enforce the prior award without modifying the substance of the prior award.

New issues raised for the first time in the reply brief concerning the release provisions of the settlement agreement and the requirements for rescission have been waived. The judgment, therefore, is affirmed.

FACTUAL AND PROCEDURAL HISTORY¹

Dispute, Arbitration, and Federal Action

NeuroSigma is a medical technology company formed in Los Angeles in 2007. De Salles participated in the formation of NeuroSigma and was its Chief Medical Officer. Gorgulho is De Salles' wife. De Salles purchased 50,000 shares of NeuroSigma on September 2, 2008, pursuant to a stock purchase agreement. Section 10.8 of the stock purchase agreement required any controversy involving any claim arising out of or related to the agreement to be arbitrated under the Commercial Arbitration Rules of the American Arbitration Association (AAA). De Salles transferred the shares to the De Salles Children's Trust.

De Salles and Gorgulho moved to Brazil in 2012. Leon Ekchian is the Chief Executive Officer of NeuroSigma, while Lodwick M. Cook III, is the chairman of NeuroSigma. In early 2013, NeuroSigma terminated De Salles' employment and attempted to repurchase the shares held by the trust.

In August 2013, NeuroSigma initiated a demand for arbitration with AAA against De Salles, individually and as co-trustee of the trust, to obtain a declaration that NeuroSigma's attempt to repurchase the shares was justified

¹ The request for judicial notice filed by NeuroSigma on December 28, 2018, is granted, as is the request for judicial notice filed by De Salles and Gorgulho on January 28, 2019.

under the stock purchase agreement. De Salles filed his own claims in arbitration.

On October 29, 2013, NeuroSigma filed an action in federal court against De Salles and Gorgulho in their individual capacities for misappropriation of trade secrets, conversion, breach of implied contract, quantum meruit, and accounting (Federal Action 1). On January 31, 2014, the federal court granted a motion by De Salles to stay the proceedings and compel arbitration of the proceedings against De Salles.

On May 20, 2014, NeuroSigma filed an amended demand for arbitration. In addition to declaratory relief, NeuroSigma alleged claims for rescission, statutory and common law misappropriation of trade secrets, conversion, statutory and common law unfair competition, breach of implied contract, and accounting.

On January 16, 2015, the federal court granted Gorgulho's motion to compel arbitration of all claims against her and to stay the federal action pending decision in the arbitration. On March 2, 2015, NeuroSigma brought a second amended demand for arbitration, which added Gorgulho as a respondent, individually and as a co-trustee of the trust.

A panel of three arbitrators began hearings in June 2015. AAA issued a letter on December 2, 2015, stating that no further evidence would be submitted, the hearings were declared closed, and the panel would render an award by January 4, 2016.

On December 29, 2015, the arbitration panel issued a “partial final arbitration award.” The panel found NeuroSigma did not have the right to repurchase the shares, because there were no unvested shares. NeuroSigma’s actions in terminating De Salles and attempting to repurchase his shares were arbitrary, capricious and unreasonable. The panel also found no misappropriation of trade secrets or grounds for rescission. The award voided the involuntary repurchase of shares. The panel ordered NeuroSigma to reinstate the shares held by the trust and issue new share certificates to the trust. NeuroSigma was also to allow De Salles and Gorgulho access to the books and records of the company. No punitive damages were available on the contract claims. The panel awarded attorney fees of \$1,801,698, plus costs, to the trust. De Salles and Gorgulho sought sanctions for NeuroSigma’s conduct during discovery, but because they were not entitled to recover more than attorney fees and costs caused by the conduct, which they were recovering already, the panel found they were not entitled to any additional award as sanctions. NeuroSigma’s claims were denied.

The partial final award resolved “all claims and counterclaims submitted in this arbitration, except those arising out of the implementation of the Award as it relates to the issuance of Shares without restrictions, and conduct, rights and remedies of the Parties associated thereto. [The panel reserved] jurisdiction to resolve any disputes regarding the transfer of the Shares without the restrictions

enumerated in [the] award in the section on equitable relief.” The panel retained jurisdiction for 60 days from the date of the partial final award, or until completion of the issuance of the shares and implementation of the other remedies set forth in the partial final award. Upon expiration of 60 days, the partial final award would become the final award, unless the panel determined additional remedies or orders were necessary to fully resolve the matter.

On January 27, 2016, the panel requested briefing concerning additional remedies. On February 2, 2016, NeuroSigma objected that the panel had no authority to impose additional remedies because the time for issuing the award had passed and it was prior to enforcement of the award. On February 26, 2016, the panel issued a final arbitration award. In the final award, among other remedies, the panel ordered NeuroSigma to provide a corporate surety bond in favor of De Salles and Gorgulho for the amount of the shares to be transferred, and if NeuroSigma failed to transfer the shares or post the bond, interest would accrue on the value of the shares until transferred. The panel also ordered NeuroSigma to pay \$2,000 per day in sanctions until it provided full access to the books and records of NeuroSigma.

On February 17, 2016, De Salles filed an action in federal court against Cook and Ekchian (Federal Action 2). De Salles alleged causes of action for breach of fiduciary duty and conversion related to the involuntary share repurchase.

On February 29, 2016, in Federal Action 1, De Salles filed a motion to reopen the case and dissolve the stay. On March 3, 2016, De Salles filed a petition to confirm the final arbitration award. NeuroSigma filed a motion to modify or vacate the final award on the grounds that the panel exceeded its authority under the commercial arbitration rules by issuing an award after the hearing closed and time expired.

On May 12, 2016, the federal court in Federal Action 1 granted De Salles's motion to reopen the case. The court denied NeuroSigma's motion to vacate or modify the arbitration award, and granted De Salles's petition to confirm the arbitration award. The court entered judgment on May 24, 2016, in favor of De Salles and Gorgulho based on the final arbitration award.

On May 27, 2016, the parties entered into a global settlement agreement on the record before the federal court. A written settlement agreement was prepared over several months to resolve all the disputes of the arbitration and the federal actions. The agreement contained a mutual release and a waiver of unknown claims under Civil Code section 1542. It also provided for the federal court to retain jurisdiction to enforce the agreement. NeuroSigma refused to sign the written settlement agreement, arguing that the only material terms of the agreement were contained in a portion of the transcript of the oral settlement. On January 31, 2017, the federal court ordered NeuroSigma, Ekchian, and Cook (the NeuroSigma parties) to sign the settlement

agreement no later than February 3, 2017. The NeuroSigma parties sought an emergency stay, which was denied. On February 16, 2017, the NeuroSigma parties filed a notice in federal court that they had executed the settlement documents to comply with the federal court's order. NeuroSigma reasserted and reaffirmed all objections previously made as to the settlement documents, and stated that execution of the settlement documents to comply with the federal court's order did not waive the NeuroSigma parties' objections or appellate rights.

On March 9, 2017, De Salles filed a stipulation by NeuroSigma, De Salles and Gorgulho as follows: "[Whereas], on May 27, 2016, the Parties reached a settlement on the record of all claims in the Action wherein it was agreed that the Action be dismissed with prejudice; [¶] [Whereas], on February 2, 2017, Plaintiff filed an appeal to the Ninth Circuit in Case No. 17-55128 (consolidated with Case No. 17-55129). [¶] Based on the foregoing facts, Plaintiff and Defendants stipulate and agree as follows: [¶] 1. This Court should dismiss the above-captioned Action in its entirety against Defendants with prejudice. [¶] 2. All upcoming hearings and deadlines are hereby vacated and the Action is hereby terminated. [¶] 3. This Court should retain jurisdiction to administer and enforce the Settlement Agreement between the Parties." A proposed order was attached for dismissal of the action with prejudice. The proposed order directed the clerk to close the case and retained jurisdiction over the matter for the purpose of

administration and enforcement of the settlement agreement between the parties. The federal court entered the order that same day.

NeuroSigma delivered share certificates, but failed to make the first payment due under the settlement agreement. De Salles filed a motion in federal court on March 22, 2017, to enforce the settlement agreement. NeuroSigma moved to vacate all prior orders in the federal court on the basis that the court lacked diversity jurisdiction. On April 20, 2017, the federal court found there was not complete diversity, based on the information from the parties that De Salles and Gorgulho were United States citizens living abroad. The federal court dismissed Federal Action 1 with prejudice and vacated all federal court orders previously issued.

Action to Confirm Arbitration Award in Superior Court and Opposition

On April 25, 2017, De Salles and Gorgulho, in their individual capacities, filed the instant action in superior court to confirm the final arbitration award. On June 12, 2017, NeuroSigma filed a combined opposition to the petition to confirm the award and motion to vacate the arbitration award on multiple independent procedural and substantive grounds. NeuroSigma stated the pertinent facts, including that the federal court had ordered causes of action to arbitration over NeuroSigma's objection and an oral

settlement was entered into on May 27, 2016, “which was never effected because De Salles attempted to add material terms to the parties’ oral agreement to which NeuroSigma did not, and would not, agree.” NeuroSigma argued there was no valid order compelling NeuroSigma to arbitrate claims for which the arbitration panel awarded damages. NeuroSigma noted that parties may petition to confirm, modify or vacate an arbitration award, and a party opposing confirmation may move the court to correct or vacate the award on multiple different grounds.

NeuroSigma made the following arguments in the trial court. Two of its three claims had been ordered to arbitration, when the federal court never had jurisdiction, and therefore, the void federal court order rendered the arbitration void. The federal court never had jurisdiction over the parties or the disputes, the order compelling arbitration of NeuroSigma’s claims was void, and the invalid federal court orders tainted every aspect of the arbitration. Alternatively, the state court had to reconsider the original motions to compel arbitration, and if the court found the motions to compel arbitration should not have been granted, vacate the arbitration award.

In addition, the arbitration should have applied California laws governing arbitration, rather than federal laws. NeuroSigma noted that arbitrators have broader ethical disclosure requirements under California law, and one of the arbitrators on the panel had failed to disclose material information that she served as general counsel for a

corporation. AAA's Commercial Arbitration Rules require an arbitration award be made no later than 30 calendar days from the date of closing the hearing, but the final award in this matter was issued 85 days after the close of the hearings, and therefore, should be vacated.

The petition was also barred because De Salles and Gorgulho voluntarily filed a stipulation in federal court to dismiss the federal case with prejudice, before the federal court ruled that it lacked jurisdiction. A dismissal entered with prejudice bars a subsequent action. NeuroSigma argued that "De Salles may not now complain that his dismissal with prejudice is ineffective because he filed the dismissal pursuant to an invalid settlement agreement." De Salles and Gorgulho could have protected themselves by refusing to dismiss the underlying action. The stipulation to dismiss the federal action remained effective because it was voluntary, not a federal court order, and not covered by the federal court order vacating all prior orders. De Salles and Gorgulho are, therefore, barred from relitigating the matter in state court.

NeuroSigma argued that the arbitration award was defective because it required illegal conduct. De Salles had worked as a neurosurgeon at the University of California at Los Angeles and as co-director of the Epilepsy Surgery Program for the West Los Angeles Veteran's Administration Hospital (VA) within the Department of Veterans Affairs. He brought technologies that he helped develop as a VA employee to NeuroSigma, which licensed the technology

from the VA. The arbitration panel exceeded its authority by ordering compensation to De Salles for work that he performed for NeuroSigma while employed at the VA.

The arbitration panel also exceeded the scope of its power by ordering NeuroSigma to remove transfer restrictions from stock certificates. Awarding stock directly to an unrelated third party, the Regents of the University of California, exceeded the panel's authority. The attorney fees award exceeded the panel's authority, because NeuroSigma requested attorney fees with respect to misappropriation of trade secrets only, and the panel could not award attorney fees that were incurred in a separate litigation between De Salles and the Regents.

The arbitration panel had no authority to require immediate compliance with the award before the award was confirmed by a court of law. Until the award is confirmed by a court and final, NeuroSigma cannot be forced to perform or penalized for failing to perform. The provision requiring immediate compliance exceeded the arbitration panel's authority. Lastly, NeuroSigma was deprived of due process in the arbitration by being ordered to arbitrate claims by a federal court that had no authority to order arbitration and for the failure to grant a continuance to allow new counsel to prepare for arbitration. NeuroSigma requested that the trial court vacate the arbitration award in its entirety and deny the petition to confirm it.

The trial court provided a written tentative ruling to the parties, which is not contained in the record on appeal,

prior to hearing argument on the petition to confirm the arbitration award on August 3, 2017. During the hearing, among other arguments, NeuroSigma asserted that the voluntary dismissal of the federal case, once signed and filed, was self-executing. The trial court asked, “What happened to that? Wasn’t there a settlement of the whole thing including this case?” NeuroSigma responded that there was a settlement on the record, and De Salles and Gorgulho wanted to adopt additional terms into the settlement on the record. NeuroSigma objected to the additional terms, litigated the issue, and the federal court ordered NeuroSigma to sign the agreement. NeuroSigma added, “And we said we can’t agree to it. So we signed the agreement under protest and under objection.” The voluntary dismissal of the federal action had been filed in the interim. NeuroSigma looked at all issues from the beginning and concluded the federal court never had jurisdiction.

Neither party argued before or during the hearing that the settlement agreement itself presented any issue for the trial court’s determination, and there was no further discussion of the settlement agreement. NeuroSigma requested a written statement of decision.

The court issued a tentative statement of decision on August 8, 2017, which is not part of the record on appeal. NeuroSigma filed objections to the tentative statement of decision. NeuroSigma stated that the trial court found the voluntary dismissal of the federal action did not bar the

state court action, because (1) the dismissal only became effective upon a federal court order of dismissal, which had been vacated, and (2) as a matter of equity, it would be an injustice to allow NeuroSigma to enforce the dismissal after repudiating the settlement agreement that induced it. The trial court observed that NeuroSigma had apparently taken the position that the settlement was null and void.

NeuroSigma objected to the trial court's statements about the settlement agreement as unsupported by the evidence. NeuroSigma argued that it never repudiated the oral or written settlement, other than to object to the inclusion of certain disputed terms. NeuroSigma had complied with the settlement by transferring shares. De Salles and Gorgulho had noted that NeuroSigma objected to certain terms being incorporated in the settlement and had breached the agreement by failing to comply with a payment obligation, but they had not stated that NeuroSigma repudiated the agreement. The oral and written settlement agreements required De Salles and Gorgulho to dismiss their claims for relief with prejudice.

Any conclusion that the settlement and the resulting voluntary dismissals were invalid because the federal court vacated the order compelling NeuroSigma's execution of the written settlement agreement was incorrect. Voluntary dismissals were effective without court action, unless the court expressly retained jurisdiction over the settlement agreement or by incorporating terms of the settlement agreement in the order. NeuroSigma argued that the

settlement agreement had not been repudiated, and therefore, the voluntary dismissal pursuant to the settlement was effective and barred De Salles and Gorgulho from pursuing relief. For the first time, NeuroSigma also argued that because NeuroSigma had not repudiated the written agreement, De Salles and Gorgulho's only option was to bring a new action to enforce the settlement. NeuroSigma objected that the effect of the settlements and the dismissal with prejudice were key controverted factual issues that the statement of decision failed to address.

On September 12, 2017, the trial court issued its statement of decision granting the petition to confirm the arbitration award. The court found, as the federal court had, that the causes of action were so intertwined that arbitration of the disputes was required under the stock purchase agreement. The selection of the arbitrators had been made independent of the federal court, and the arbitrators' impartiality was not affected by the federal court's lack of jurisdiction, so there was no need to re-arbitrate the claims decided by the arbitrators. Although the hearings in the arbitration concluded on December 2, 2015, and AAA rules required the panel to issue an award within 30 days, the panel had authority under the arbitration agreement and AAA rules to fashion any remedy, including a partial final award that identified the prevailing parties and reserved jurisdiction to later issue a final award resolving all issues.

The parties' stipulation to dismiss the federal action with prejudice did not bar relief, because the dismissal was

effective only upon the federal court's order, which was vacated when the federal court determined that it did not have jurisdiction. In addition, the dismissal was pursuant to a settlement agreement giving the federal court continuing jurisdiction to enforce the settlement agreement. As a matter of equity, it would be an extreme injustice to allow NeuroSigma to enforce the dismissal with prejudice, while seeking to divest the federal court of jurisdiction, and without showing NeuroSigma's full performance under the settlement agreement. NeuroSigma has apparently taken the position that the settlement agreement is void, so cannot argue that actions taken in reliance on the agreement are effective.

The court noted that the statement of decision had been revised to find that NeuroSigma's course of conduct prevented reliance on the dismissal of the federal action, rather than a technical finding that NeuroSigma repudiated the settlement agreement. The court added that NeuroSigma had not raised the settlement agreement in response to the motion to confirm the arbitration award or in its own motion to vacate the arbitration award. If NeuroSigma believed there was a settlement agreement in effect, NeuroSigma could have raised it as a bar to confirmation of the arbitration award. NeuroSigma did not raise the settlement agreement, however, until after the tentative statement of decision was issued. In NeuroSigma's objections to the tentative statement of decision, NeuroSigma raised new contentions and evidence about the

settlement agreement and sought findings on an issue that was not raised by the extensive filings in the record. The new evidence, even if considered, would not change the court's conclusion that NeuroSigma could not equitably rely on a proceeding in the federal court that NeuroSigma sought to divest of jurisdiction. The trial court entered a judgment confirming the final arbitration award on September 29, 2017.

NeuroSigma filed a motion for reconsideration, or alternatively, for a new trial, which the trial court denied. NeuroSigma filed a notice of appeal from the judgment on December 19, 2017.

DISCUSSION

Standard of Review and Statutory Scheme

“The trial court’s decision granting respondent’s petition to confirm the cost award is reviewed de novo. (*Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 376, fn. 9.) If the trial court’s ruling relies on a determination of disputed factual issues, we apply the substantial evidence test on those particular issues. (*Toal v. Tardif* (2009) 178 Cal.App.4th 1208, 1217.) Where error is shown, this court may not set aside the order unless the error prejudiced the appellant. (Cal. Const., art. VI, § 13; Code Civ. Proc., § 475.)” (*EHM Productions, Inc. v. Starline*

Tours of Hollywood, Inc. (2018) 21 Cal.App.5th 1058, 1063 (*EHM Productions*).)

Code of Civil Procedure section 1285 allows a party to an arbitration proceeding in which an award is made to petition the court to “confirm, correct or vacate the award.”² “Once a petition to confirm an award is filed, the superior court must select one of only four courses of action: It may confirm the award, correct and confirm it, vacate it, or dismiss the petition. (*Cooper v. Lavelly & Singer Professional Corp.* (2014) 230 Cal.App.4th 1, 11.) ‘[I]t is the general rule that, with narrow exceptions, an arbitrator’s decision cannot be reviewed for errors of fact or law.’ (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 11.) Under section 1286.2, the court may vacate the award only under “very limited circumstances.” (*Roehl v. Ritchie* (2007) 147 Cal.App.4th 338, 347.) Neither the trial court, nor the appellate court, may ‘review the merits of the dispute, the sufficiency of the evidence, or the arbitrator’s reasoning, nor may we correct or review an award because of an arbitrator’s legal or factual error, even if it appears on the award’s face. Instead, we restrict our review to whether the award should be vacated under the grounds listed in section 1286.2. [Citations.]’ [Citation.]” (*EHM Productions, supra*, 21 Cal.App.5th at pp. 1063–1064, fn. omitted.) One of the grounds for a court to vacate an arbitration award is that “[t]he arbitrators

² All further statutory references are to the Code of Civil Procedure unless otherwise stated.

exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted.” (Code Civ. Proc., § 1286.2, subd. (4).)

Stipulation for Dismissal of Federal Action

NeuroSigma contends the parties’ stipulation to dismiss Federal Action 1 was a self-effectuating stipulation of dismissal under rule 41(a)(1)(ii)(a) of the Federal Rules of Civil Procedure, which did not require a court order to be effective. NeuroSigma further contends, as a result of voluntarily dismissing the federal action with prejudice, De Salles and Gorgulho were barred from pursuing confirmation of the arbitration award in state court. We conclude the parties’ stipulation was not self-effectuating but effective only because it was ordered by the federal court. When the federal court vacated all of its orders, the stipulation of dismissal was no longer effective. The federal court’s dismissal of the federal actions for lack of diversity jurisdiction did not prevent De Salles and Gorgulho from later filing a state court action.

Rule 41(a)(1)(A) of the Federal Rules of Civil Procedure (28 U.S.C.), provides for voluntary dismissal of an action by the plaintiff without a court order as follows: “Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing: [¶] (i) a notice of dismissal before the

opposing party serves either an answer or a motion for summary judgment; or ¶ (ii) a stipulation of dismissal signed by all parties who have appeared.”

Rule 41(a)(2) of the Federal Rules of Civil Procedure (28 U.S.C.), provides for voluntary dismissal of an action by court order as follows: “Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff’s request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff’s motion to dismiss, the action may be dismissed over the defendant’s objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.”

“If the parties *wish* to provide for the court’s enforcement of a dismissal-producing settlement agreement, they can seek to do so.” (*Kokkonen v. Guardian Life Ins. Co. of America* (1994) 511 U.S. 375, 381 (*Kokkonen*).) In ordering a dismissal under rule 41(a)(2) of the Federal Rules of Civil Procedure, the federal court may exercise its discretion to require the parties’ compliance with the terms of the settlement contract or the court’s retention of jurisdiction over the settlement contract as one of the terms set forth in the order. (*Ibid.*) The United States Supreme Court stated in dicta in *Kokkonen* that although the plain language of rule 41(a)(1)(A)(ii) does not empower a federal court to impose terms on the parties’ stipulation of dismissal, the court is authorized to incorporate the settlement contract

in its dismissal order or retain jurisdiction over the settlement contract, if the parties agree. (*Id.* at pp. 381–382.)

“When a court has jurisdiction over the parties and subject matter of a suit, its jurisdiction continues until a final judgment is entered. [Citation.] When there is a voluntary dismissal of an entire action, the court’s jurisdiction over the parties and the subject matter terminates.” (*Wackeen v. Malis* (2002) 97 Cal.App.4th 429, 437.)

In this case, the request for dismissal of the federal action was based on the parties’ stipulation, which asked the federal court to enter an order of dismissal containing certain terms. The stipulation urged that the federal court should dismiss the action with prejudice and should retain jurisdiction to administer and enforce the settlement agreement. De Salles attached a proposed order for entry by the federal court that retained jurisdiction to enforce the settlement agreement. The plain language of the request for dismissal, taken as a whole, asked the federal court to enter an order of dismissal containing specific terms. The stipulation was not an automatic dismissal under rule 41(a)(1)(A)(ii) made without a court order. We conclude that the trial court properly found the dismissal of Federal Action 1 was made pursuant to rule 41(a)(2) of the Federal Rules of Civil Procedure, which required entry of a court order to be effective. Since the federal court vacated the order of dismissal entered pursuant to the stipulation, and instead

entered a new and different order dismissing the federal action for lack of diversity jurisdiction, De Salles and Gorgulho were not barred from pursuing confirmation of the final arbitration award in state court.

The cases relied upon by NeuroSigma on appeal are distinguishable. The plaintiffs in *Wackeen v. Malis, supra*, 97 Cal.App.4th 429, *Viejo Bancorp, Inc. v. Wood* (1989) 217 Cal.App.3d 200, and *Kokkonen, supra*, 511 U.S. 375, dismissed actions in their entirety, without requesting that the court retain jurisdiction to enforce a settlement agreement, in contrast to the dismissal request in this case.

In opposition to the motion to confirm the arbitration award, NeuroSigma did not timely raise any argument that, by entering a valid and enforceable settlement agreement, DeSalles and Gorgulho were barred from seeking to confirm the arbitration award. In fact, rather than suggest that a prior settlement agreement deprived the trial court of subject matter jurisdiction to address the arbitration award, NeuroSigma insisted that the trial court had jurisdiction to address NeuroSigma's own motion seeking "to vacate the Award in its entirety." NeuroSigma contended that the federal court lacked authority to order the arbitration, that it impermissibly expanded the scope of arbitrable issues, and that it applied the wrong law, resulting in incurable procedural defects. NeuroSigma asked to send the parties back to the position they were in prior to arbitration, imploring the trial court to revisit and hear arguments on the original motion to compel arbitration. Further,

NeuroSigma invited the trial court to review the arbitration panel's compliance with AAA procedural rules, and to find that the award made was substantively defective. In making these requests, it is clear NeuroSigma was not contending that a valid and enforceable settlement agreement deprived the trial court of jurisdiction to address the arbitration. Moreover, with respect to any prior settlement, NeuroSigma expressly stated that the parties' stipulation to dismiss the federal case was made pursuant to an "invalid" settlement agreement. De Salles and Gorgulho did not argue or concede that the settlement agreement was valid or enforceable simply by including the facts about the settlement and the rule 41 dismissal in their general recitations of the facts of the case.

To the extent that NeuroSigma contends on appeal that a valid settlement agreement exists that bars relitigation of settled issues, we find NeuroSigma has waived issues related to the settlement agreement. "Ordinarily the failure to preserve a point below constitutes a waiver of the point. [Citation.] This rule is rooted in the fundamental nature of our adversarial system "In the hurry of the trial many things may be, and are, overlooked which could readily have been rectified had attention been called to them. The law casts upon the party the duty of looking after his legal rights and of calling the judge's attention to any infringement of them." . . . [¶] The same policy underlies the principles of "theory of the trial." "A party is not permitted to change his position and adopt a new and

different theory on appeal. To permit him to do so would not only be unfair to the trial court, but manifestly unjust to the opposing party.” [Citation.] The principles of “theory of the trial” apply to motions’ [Citation.]” (*Sommer v. Gabor* (1995) 40 Cal.App.4th 1455, 1468 (*Sommer*).)

“Although an appellate court, in its discretion may allow an appellant to raise a new issue of law on appeal, appellate courts “are more inclined to consider such tardily raised legal issues where the public interest or public policy is involved.” [Citation.] However, if the new theory contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented at trial the opposing party should not be required to defend against it on appeal. [Citation.]” (*Sommer, supra*, 40 Cal.App.4th at p. 1468.)

If NeuroSigma had desired a ruling on the enforceability of the settlement agreement or the application of specific provisions, it could have raised the issues in its opposition to the motion to confirm the arbitration award. Instead, NeuroSigma stated that the settlement agreement was invalid and ineffective. After the trial court’s ruling, NeuroSigma objected that there was no evidence to support finding that NeuroSigma repudiated the settlement agreement. The trial court removed the portion about repudiation and relied on a different basis to support the ruling. Although NeuroSigma made additional arguments about the settlement agreement in objection to the statement of decision, the trial court concluded that the

effectiveness of the settlement agreement had not been a controverted issue at trial. Based on our review of the record, this conclusion was clearly correct. The statement of decision resolved all of the controverted issues presented in the pleadings and the hearing. NeuroSigma has not challenged the trial court's ruling denying the motion for a new trial, and NeuroSigma cannot raise issues related to the effectiveness of the settlement agreement for the first time on appeal.

Remedies Provided in Final Arbitration Award

On appeal, NeuroSigma contends that the trial court should have deleted provisions for sanctions and interest in the final arbitration award. Specifically, NeuroSigma contends that the arbitration panel exceeded its authority by (1) modifying an award that resolved all the issues, (2) issuing an untimely final award, and (3) providing enforcement measures. NeuroSigma, however, never requested that the trial court modify or correct the final arbitration award by deleting the provisions allowing sanctions and interest. Even were we to construe NeuroSigma's arguments in the lower court as a request to modify the final arbitration award, none of NeuroSigma's contentions have merit.

A. Construction of the Partial and Final Awards

NeuroSigma contends that the partial arbitration award resolved all the issues submitted to the panel, and therefore, the final arbitration award exceeded the arbitrator's authority by reconsidering the merits of issues that had been decided and modifying the partial award to add new damage elements. This is incorrect.

The partial award expressly stated that it did not resolve claims arising out of implementation of the award related to issuing shares and the associated conduct, rights and remedies of the parties. The panel reserved jurisdiction to resolve the parties' disputes over these issues in the final award and allowed further briefing from the parties on the proper remedies. The final award provided that interest would accrue until NeuroSigma transferred the shares or posted a bond, and imposed sanctions of \$2,000 per day until NeuroSigma provided full access to the books and records. Since the partial award did not resolve these issues and reserved jurisdiction to decide the proper remedies related to implementation of the award, the provisions included in the final award were not a modification of the partial award as to these issues. The final award did not change the substance of the partial award; it added a ruling on issues that were not resolved by the partial award.

B. Timeliness

NeuroSigma contends the final award issued by the arbitration panel violated the time limitations for issuing a final award. This is incorrect.

Code of Civil Procedure section 1283.8, which governs arbitration proceedings, provides in pertinent part: “The award shall be made within the time fixed therefor by the agreement or, if not so fixed, within such time as the court orders on petition of a party to the arbitration.” The stock purchase agreement provides for arbitration under the AAA Commercial Arbitration Rules, which requires an award to be issued within 30 days from the date of closing of the arbitration hearing. (AAA, Commercial Arbitration Rules (2013), rule 45, p. 27.)

Rule 47 of the AAA Commercial Arbitration Rules provides: “(a) The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract. [¶] (b) In addition to a final award, the arbitrator may make other decisions, including interim, interlocutory, or partial rulings, orders, and awards. In any interim, interlocutory, or partial award, the arbitrator may assess and apportion the fees, expenses, and compensation related to such award as the arbitrator determines is appropriate.” (AAA, Commercial Arbitration Rules (2013), rule 47, p. 28.)

“The limitations placed on judicial review and oversight of an arbitration award have resulted in a substantial deference to the arbitrator’s own assessment of his or her authority to resolve an issue. (*Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 372–373 [*Advanced Micro*].) ‘[C]ourts should generally defer to an arbitrator’s finding that determination of a particular question is within the scope of his or her contractual authority.’ (*Id.* at p. 372.) Section 1283.4 states that an arbitrator’s written award shall determine all submitted questions ‘necessary in order to determine the controversy.’ It is, however, for the arbitrator to determine what issues are ‘necessary’ to the ultimate decision. (*Morris v. Zuckerman* (1968) 69 Cal.2d 686, 690.)” (*Hightower v. Superior Court* (2001) 86 Cal.App.4th 1415, 1434 (*Hightower*).)

“The same deference extended to an arbitrator’s determination as to the *scope* of his or her authority also applies to the arbitrator’s *choice of a remedy*. (*Advanced Micro, supra*, 9 Cal.4th at p. 381.) ‘In providing for judicial vacation or correction of an award, our statutes (§§ 1286.2, subd. (d), 1286.6, subd. (b)) do not distinguish between the arbitrators’ power to decide an issue and their authority to choose an appropriate remedy; in either instance the test is whether the arbitrators have “exceeded their powers.” Because determination of appropriate relief also constitutes decision on an issue, these two aspects of the arbitrators’

authority are not always neatly separable.’ (*Id.* at p. 373.)” (*Hightower, supra*, 86 Cal.App.4th at pp. 1434–1435.)

“What is mandated by statutory and case law is that the arbitrator decide *all* of the submitted issues and that such decision, once rendered, may be subject to judicial review, only upon certain limited conditions not here applicable. This does not come close to foreclosing the utilization of a multiple incremental or successive award process as a means, *in an appropriate case*, of finally deciding *all* submitted issues.” (*Hightower, supra*, 86 Cal.App.4th at p. 1434.)

“We view this incremental process structured by the arbitrator as reasonably necessary, if not essential, to the effective establishment and enforcement of the remedy that the arbitrator has fashioned. . . . The arbitrator has not improperly left undecided issues ‘necessary in order to determine the controversy.’ Rather, he has determined all issues that are necessary to the resolution of the essential dispute arising from [the cause of action]. The arbitrator’s judgment on this point must be respected. (*Advanced Micro, supra*, 9 Cal.4th at pp. 367, 372–374; *Morris v. Zuckerman, supra*, 69 Cal.2d at p. 690.) Nothing remains to be resolved except those potential and conditional issues that necessarily could not have been determined . . . when the Partial Final Award was issued. [¶] Thus, the arbitrator’s choice of a remedy must be viewed as including this incremental or multistep process involving an initial and a final award, both of which would be subject to confirmation by the court. In

order to sustain the Partial Final Award, it is only necessary that we find a link between relief granted in the award and the contractual terms of the Shareholders Agreement as (1) actually interpreted by the arbitrator or (2) an interpretation implied in the award itself or (3) a plausible theory of the contract's general subject matter, framework or intent. (*Advanced Micro, supra*, 9 Cal.4th at p. 381.) We have no trouble finding the required link in this case.” (*Hightower, supra*, 86 Cal.App.4th at p. 1439, fn. omitted.)

In *Hightower*, the appellate court held that “the arbitrator’s Partial Final Award was entirely proper, even though there remained a number of potential and conditional issues that the arbitrator will have to address in a final order in order to give total and complete relief to [the prevailing party] and to enforce [petitioner] Hightower’s rights under the Partial Final Award. This process does not offend section 1283.4 or any other statutory provision; nor was it precluded by the terms of the Shareholders Agreement or the rules applicable to the arbitration.” (*Hightower, supra*, 86 Cal.App.4th at pp. 1440–1441, fn. omitted.)

We conclude that the arbitration panel had authority to issue the partial award resolving the merits of the parties’ claims within the time required under the AAA rules, while reserving jurisdiction to determine proper remedies arising from enforcement of the award. The partial award resolved the issues necessary to determine the controversy, but reserved jurisdiction to address the issues that could arise in

effectuating the award. The arbitration rules and the case law allow for this two-step procedure in complex matters, and NeuroSigma has not demonstrated any prejudice as a result.

C. Enforcement

NeuroSigma contends the arbitration panel exceeded its authority by adding enforcement measures in the final arbitration award in the form of sanctions and interest, which NeuroSigma contends were the province of the trial court. We disagree.

As cited above, the arbitration panel's choice of remedies is accorded substantial deference. (*Hightower, supra*, 86 Cal.App.4th at p. 1435.) The panel was well within the scope of its powers to determine and remedy the harm that would result from NeuroSigma's failure to transfer shares and provide access to the company's books and records in compliance with the partial award. The remedies provided in the final award do not usurp the court's power to confirm the arbitration award or enforce the judgment. NeuroSigma was able to immediately seek relief from the award in court. NeuroSigma has not demonstrated any prejudice as a result of the remedies ordered by the panel.

Issues Raised for the First Time in Reply

NeuroSigma raises several contentions for the first time in its reply brief on appeal concerning specific provisions of the written settlement agreement, as well as the requirements for rescission of the settlement agreement. None of these issues were raised or considered in the trial court. “Consistent with well-established authority, absent justification for failing to present an argument earlier, we will not consider an issue raised for the first time in a reply brief. [Citations.] Moreover, it does not appear that this argument was raised in the trial court. It cannot be raised for the first time on appeal.” (*Save the Sunset Strip Coalition v. City of West Hollywood* (2001) 87 Cal.App.4th 1172, 1181–1182, fn. 3.)

DISPOSITION

The judgment is affirmed. Respondents Antonio A.F. De Salles and Alessandra Gorgulho are awarded their costs on appeal.

MOOR, J.

WE CONCUR:

RUBIN, P. J.

KIM, J.